

RECEIPT # 1269
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 LOCAL RULE 4.1
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 BY DPTY. CLK M
 DATE 3-7-05

UNITED STATES DISTRICT COURT
 DISTRICT OF MASSACHUSETTS FILED
CLERK'S OFFICE

03/07/05 P 2:55

THE MASSACHUSETTS INSTITUTE
 FOR A NEW COMMONWEALTH,

UNITED STATES
 DISTRICT OF MASS.

Plaintiff,

Civil Action No.

v.

NICHE MEDIA HOLDINGS, LLC
 and NICHE MEDIA LLC,

JURY TRIAL DEMANDED

Defendants.

05-10422 PBS

COMPLAINT

MAGISTRATE JUDGE Alvarez

Plaintiff THE MASSACHUSETTS INSTITUTE FOR A NEW COMMONWEALTH, by its undersigned attorneys, by way of Complaint herein, alleges as follows:

THE PARTIES

1. Plaintiff THE MASSACHUSETTS INSTITUTE FOR A NEW COMMONWEALTH (hereinafter "MassINC") is a Massachusetts corporation having its principal place of business at 18 Tremont Street, Suite 1120, Boston, Massachusetts 02108.

2. On information and belief, Defendant NICHE MEDIA HOLDINGS, LLC is a New York limited liability company having its principal

place of business at 275 Park Avenue South, 5th Floor, New York, New York 10110. On information and belief, Defendant Niche Media Holdings, LLC has conducted and is conducting business in this judicial district.

3. On information and belief, Defendant NICHE MEDIA LLC is a New York limited liability company having its principal place of business at 275 Park Avenue South, 5th Floor, New York, New York 10110. On information and belief, Defendant Niche Media LLC has conducted and is conducting business in this judicial district.

JURISDICTION AND VENUE

4. This court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1332 and 1338(a) and (b), and pursuant to the doctrine of supplemental jurisdiction as codified in Title 28 U.S.C. § 1337. The matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between citizens of different states.

5. Venue is proper in this judicial district pursuant to 28 U.S.C. § 1331.

COUNT I - VIOLATION OF LANHAM ACT Section 43(a) [15 U.S.C. § 1125(a)]

6. Since 1996, Plaintiff MassINC has used the mark and name COMMONWEALTH as the title of a magazine focusing on people, politics, and civic life in Massachusetts. The magazine is published with the financial support of a broad cross-section of leading corporations, labor unions, foundations, and individuals in the Boston area. It is widely read by business, media, and community leaders across the state. Print circulation is currently 10,000 copies, and electronic circulation is 15,000 copies (including 11,000 to individuals who do not receive the printed version). Through publication of COMMONWEALTH magazine in print form since 1996 and in on-line form since 1998, Plaintiff MassINC has developed substantial goodwill in the mark and name COMMONWEALTH as an indicator of source for its publications.

7. In early December 2004, MassINC learned that Defendants were planning to publish a magazine in Massachusetts under the title "COMMONWEALTH." On December 7, 2004, counsel for MassINC put Defendants on written notice of Plaintiff's rights in the COMMONWEALTH mark and name and, in an effort at resolving the matter amicably, counsel suggested that Defendants adopt a new name for their proposed magazine.

8. Plaintiff did not receive a response to the December 7th letter, but learned that Defendants now planned to use the title "BOSTON COMMONWEALTH" for their new Massachusetts-directed magazine. On December 17, 2004, Plaintiff's counsel wrote again to Defendants, pointing out that "BOSTON COMMONWEALTH" was just as likely to confuse the public as the name "COMMONWEALTH," and counsel again suggested that Defendants choose a new name.

9. Also on December 17, 2004, MassINC filed United States trademark applications to register the mark COMMONWEALTH for printed and on-line magazines.

10. On or about January 17, 2005, Plaintiff received a written response from counsel for Defendants, denying any likelihood of confusion and denying that MassINC has any exclusive rights in the word "Commonwealth."

11. Defendants have continued with their plan to use the title "BOSTON COMMONWEALTH" for their new magazine, and have begun soliciting advertising for the magazine, which they assert will be published in September 2005.

12. The intended target audience for Defendants's magazine will, according to Defendants, include "the movers and shakers" of

Boston, and the magazine's coverage will include "culture, society, philanthropy." Because Plaintiff's magazine is directed to and supported by "the movers and shakers" of Boston, and because the magazine's coverage includes issues involving culture, society, and philanthropy, its readership will significantly overlap with that of Defendants.

13. Defendants use of the title "BOSTON COMMONWEALTH" is likely to cause, and has already caused, confusion, mistake, and deception of the public as to the source of their magazine. Customers and potential customers are likely to believe that Defendants' magazine is Plaintiff's magazine, or a new spin-off from Plaintiff's magazine, or that it emanates from, or is sponsored or approved by, Plaintiff MassINC. Any dissatisfaction with Defendants' magazine will reflect upon and irreparably damage the valuable reputation and goodwill of MassINC embodied in its COMMONWEALTH mark and name.

14. The actions of Defendants constitute the use in commerce of a false designation of origin in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a). Because Defendants have been on notice of MassINC's rights in the mark and name COMMONWEALTH since at least December 7, 2004, Defendants' actions are in willful violation of MassINC's rights.

COUNT II - VIOLATION OF MASSACHUSETTS GENERAL LAWS, Ch. 93A

15. Plaintiff repeats and re-alleges the allegations set forth in paragraphs 1-14 above.

16. Defendants' use of the title "BOSTON COMMONWEALTH" for their magazine directed to Massachusetts constitutes an unfair method of competition and unfair or deceptive acts or practices in the conduct of trade or commerce, in violation of M.G.L.A. Ch. 93A, Section 2.

17. Plaintiff has been and is being damaged by said acts of Defendants.

COUNT III - COMMON LAW TRADEMARK INFRINGEMENT AND UNFAIR COMPETITION

18. Plaintiffs repeat and re-allege the allegations of paragraphs 1-17 above.

19. The aforesaid actions of Defendants have damaged and are damaging Plaintiff, in violation of the common law of trademark infringement and unfair competition.

* * * * *

WHEREFORE, Plaintiff THE MASSACHUSETTS INSTITUTE FOR A NEW COMMONWEALTH demands judgment against Defendants NICHE MEDIA HOLDINGS, LLC and NICHE MEDIA LLC, as follows:

A. That Defendants be preliminarily and permanently enjoined from using the title BOSTON COMMONWEALTH and any variation thereof confusingly similar to the mark and name COMMONWEALTH, in connection with their magazine.

B. That Defendants be ordered to file with this court and to serve upon Plaintiff within thirty days of service of the permanent injunction requested herein, a report in writing, under oath, setting forth in detail the manner and form in which Defendants have complied therewith.

C. That Defendants pay to Plaintiff such damages as Plaintiff has incurred by reason of the actions complained of herein, said damages to be trebled in light of the willful nature of Defendants' actions.

D. That Plaintiff recover its costs in this civil action, as well as its reasonable attorney fees and other expenses.

E. That this court grant such other and further relief as it deems just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(b), Fed. R. Civ. P., Plaintiff hereby demands trial by jury of all issues so triable.

THE MASSACHUSETTS INSTITUTE FOR A
NEW COMMONWEALTH

Michael Boudett
Michael Boudett, BBO 558757
John L. Welch, BBO 522040
Foley Hoag LLP
World Trade Center West
155 Seaport Boulevard
Boston, MA 02210-2600
617/832-1000

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS THE MASSACHUSETTS INSTITUTE FOR A NEW COMMONWEALTH		DEFENDANTS NICHE MEDIA HOLDINGS, LLC NICHE MEDIA, LLC 2:55 COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT _____ (IN U.S. PLAINTIFF CASES ONLY)				
(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF SUFFOLK (EXCEPT IN U.S. PLAINTIFF CASES)		COUNTY MASS NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED				
(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER) Michael Boudett John Welch Foley Hoag LLP 155 Seaport Boulevard, Boston, MA 02210-2600		ATTORNEYS (IF KNOWN) 05-10422 PBS 617-832-1000				
II. BASIS OF JURISDICTION (Place an "X" in One Box Only)		III. CITIZENSHIP OF PRINCIPAL PARTIES (place an "X" in One box for Plaintiff and One box for Defendant)				
<input type="checkbox"/> 1 U.S. GOVERNMENT Plaintiff <input type="checkbox"/> 2 U.S. GOVERNMENT Defendant		<input checked="" type="checkbox"/> 3 FEDERAL QUESTION (US Government Not a Party) <input type="checkbox"/> 4 DIVERSITY (Indicate Citizenship of Parties in Item III)				
		Citizen of This State	<input type="checkbox"/> 1 <input type="checkbox"/> 1	Incorporated or Principal Place of Business in This State	<input type="checkbox"/> 4 <input type="checkbox"/> 4	
		Citizen of Another State	<input type="checkbox"/> 2 <input type="checkbox"/> 2	Incorporated and Principal Place of Business in Another State	<input type="checkbox"/> 5 <input type="checkbox"/> 5	
		Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3 <input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6 <input type="checkbox"/> 6	
IV. NATURE OF SUIT (Place an "X" in One BOX Only)						
CONTRACT <input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholder Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise		TORTS PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury		FORFEITURE/PENALTY PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury Medical Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth In Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability		
				<input type="checkbox"/> 610 Agriculture	<input type="checkbox"/> 422 Appeal 28 USC 158	<input type="checkbox"/> 400 State Reapportionment
				<input type="checkbox"/> 620 Other Food & Drug	<input type="checkbox"/> 423 Withdrawal 28 USC 157	<input type="checkbox"/> 410 Antitrust
				<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881	<input type="checkbox"/> 430 Banks and Banking	
				<input type="checkbox"/> 630 Liquor Laws	<input type="checkbox"/> 450 Commercial/ICC Rates/etc.	
				<input type="checkbox"/> 640 R.R. & Truck	<input type="checkbox"/> 460 Deportation	
				<input type="checkbox"/> 650 Airline Regs	<input type="checkbox"/> 470 Racketeer Influenced & Corrupt Organizations	
				<input type="checkbox"/> 660 Occupational Safety	<input type="checkbox"/> 480 Consumer Credit	
				Health	<input type="checkbox"/> 490 Cable/Sat TV	
				<input type="checkbox"/> 690 Other	<input type="checkbox"/> 510 Selective Service	
				LABOR	<input type="checkbox"/> 550 Securities/Commodities/ Exchange	
				<input type="checkbox"/> 710 Fair Labor Standards Act	<input type="checkbox"/> 875 Customer Challenge 12 USC 3410	
				<input type="checkbox"/> 720 Labor/Mgmt. Relation	<input type="checkbox"/> 880 Other Statutory Actions	
				<input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act	<input type="checkbox"/> 891 Agricultural Acts	
				<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 892 Economic Stabilization Act	
				<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 893 Environmental Matters	
				<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 894 Energy Allocation Act	
				FEDERAL TAX SUITS	<input type="checkbox"/> 895 Freedom of Information Act	
				<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	<input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice	
				<input type="checkbox"/> 871 IRS — Third Party 26 USC 7609		
REAL PROPERTY <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property		CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/ Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 440 Other Civil Rights		PRISONER PETITIONS HABEAS CORPUS: <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition		
				<input type="checkbox"/> 510 Motions to Vacate Sentence	<input type="checkbox"/> 861 HIA (1395 B)	
				<input type="checkbox"/> 530 General	<input type="checkbox"/> 862 Black Lung (923)	
				<input type="checkbox"/> 535 Death Penalty	<input type="checkbox"/> 863 D/WC.DJWW (405(g))	
				<input type="checkbox"/> 540 Mandamus & Other	<input type="checkbox"/> 864 SSID Title XVI	
				<input type="checkbox"/> 550 Civil Rights	<input type="checkbox"/> 865 RSI (405(g))	
				<input type="checkbox"/> 555 Prison Condition	FEDERAL TAX SUITS	
				<input type="checkbox"/> 740 Railway Labor Act	<input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)	
				<input type="checkbox"/> 790 Other Labor Litigation	<input type="checkbox"/> 871 IRS — Third Party 26 USC 7609	
				<input type="checkbox"/> 791 Empl. Ret. Inc. Security Act		
V. ORIGIN (Place an "X" in One Box Only)						
<input checked="" type="checkbox"/> 1 Original Proceeding <input type="checkbox"/> 2 Removed from State Court <input type="checkbox"/> 3 Remanded from Appellate Court <input type="checkbox"/> 4 Reinstated or Reopened <input type="checkbox"/> 5 Transferred from another district (specify) _____		<input type="checkbox"/> 6 Multidistrict Litigation <input type="checkbox"/> 7 Appeal to District Judge from Magistrate Judgment				
VI. CAUSE OF ACTION		Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 15 U.S.C. § 1125 (a)				
		Brief description of cause: Plaintiff seeks to enjoin Defendant from using similar mark as well as damages for violation of Lanham Act, violation of M.G. L., Ch. 93A and common law trademark infringement and unfair competition.				
VII. REQUESTED IN COMPLAINT		<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23		DEMAND \$ \$75,000+ <input type="checkbox"/> CHECK YES only if demanded in complaint.		
VIII. RELATED CASE(S) (See Instructions). IF ANY		JUDGE: _____		JURY DEMAND: <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		
DATE <i>March 7, 2005</i>		SIGNATURE OF ATTORNEY OF RECORD <i>Michael Boudett</i>		DOCKET NUMBER <i>05-10422 PBS</i>		

FOR OFFICE USE ONLY

RECEIPT# *10422*AMOUNT *\$75,000+*APPLYING IFP *Yes*JUDGE *Michael Boudett*MAG. JUDGE *Michael Boudett*

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

1. TITLE OF CASE (NAME OF FIRST PARTY ON EACH SIDE ONLY) THE MASSACHUSETTS INSTITUTE FOR A
NEW COMMONWEALTH v. NICHE MEDIA HOLDINGS, LLC.

2. CATEGORY IN WHICH THE CASE BELONGS BASED UPON THE NUMBERED NATURE OF SUIT CODE LISTED ON THE CIVIL COVER SHEET. (SEE LOCAL RULE 40.1(A)(1)).

I. 160, 410, 470, R.23, REGARDLESS OF NATURE OF SUIT.

II. 195, 196, 368, 400, 440, 441-446, 540, 550, 555, 625, 710, 720, 730, 740, 790, 791, 820*, 830*, 840*, 850, 890, 892-894, 895, 950

III. 110, 120, 130, 140, 151, 190, 210, 230, 240, 245, 290, 310, 315, 320, 330, 340, 345, 350, 355, 360, 362, 365, 370, 371, 380, 385, 450, 891.

IV. 220, 422, 423, 430, 460, 480, 490, 610, 620, 630, 640, 650, 660, 690, 810, 861-865, 870, 871, 875, 900.

V. 150, 152, 153.

*Also complete AO 120 or AO 121 for patent, trademark or copyright cases

3. TITLE AND NUMBER, IF ANY, OF RELATED CASES. (SEE LOCAL RULE 40.1(G)). IF MORE THAN ONE PRIOR RELATED CASE HAS BEEN FILED IN THIS DISTRICT PLEASE INDICATE THE TITLE AND NUMBER OF THE FIRST FILED CASE IN THIS COURT.

4. HAS A PRIOR ACTION BETWEEN THE SAME PARTIES AND BASED ON THE SAME CLAIM EVER BEEN FILED IN THIS COURT? YES NO

5. DOES THE COMPLAINT IN THIS CASE QUESTION THE CONSTITUTIONALITY OF AN ACT OF CONGRESS AFFECTING THE PUBLIC INTEREST? (SEE 28 USC § 2403) YES NO

IF SO, IS THE U.S.A. OR AN OFFICER, AGENT OR EMPLOYEE OF THE U.S. A PARTY? YES NO

6. IS THIS CASE REQUIRED TO BE HEARD AND DETERMINED BY A DISTRICT COURT OF THREE JUDGES PURSUANT TO TITLE 28 USC § 2284? YES NO

7. DO ALL PARTIES IN THIS ACTION, EXCLUDING GOVERNMENTAL AGENCIES OF THE UNITED STATES AND THE COMMONWEALTH OF MASSACHUSETTS ("GOVERNMENTAL AGENCIES"), RESIDING IN MASSACHUSETTS RESIDE IN THE SAME DIVISION? (SEE LOCAL RULE 40.1(D))

YES NO

A. If yes, in which division do all of the non-governmental parties reside?

Eastern Division Central Division Western Division

B. If no, in which division do the majority of the plaintiffs or the only parties, excluding governmental agencies, residing in Massachusetts reside?

Eastern Division Central Division Western Division

8. IF FILING A NOTICE OF REMOVAL – ARE THERE ANY MOTIONS PENDING IN THE STATE COURT REQUIRING THE ATTENTION OF THIS COURT? (IF YES, SUBMIT A SEPARATE SHEET IDENTIFYING THE MOTIONS)

YES NO

(PLEASE TYPE OR PRINT)

ATTORNEY'S NAME Michael Boudett

ADDRESS Foley Hoag LLP, 155 Seaport Boulevard, Boston, MA 02210-2600

TELEPHONE NO. (617) 832-1000

(Categfrm.rev-3/3/05) 2806155